

STATE OF MICHIGAN
COURT OF APPEALS

NANCY JEAN LIER,

Plaintiff-Appellant/Cross-Appellee,

v

SAINT MARY'S MEDICAL CENTER,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

September 21, 2006

No. 259596

Saginaw Circuit Court

LC No. 01-039286-NZ

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant under MCR 2.116(C)(10). Specifically, plaintiff challenges the trial court's dismissal of her claims for age and gender discrimination under the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, as well as her claim of wrongful discharge/breach of contract arising out of plaintiff's employment with defendant. We affirm.

Plaintiff began her employment with defendant as a medical technologist and eventually became the only employee of defendant's School of Medical Technology. Plaintiff held a variety of job titles over the course of her 33-year employment, including the title of program director of the medical technology school. In 2000, defendant underwent a major reorganization for financial reasons, and, as a result, 17 hospital director positions were eliminated. In February 2000, plaintiff was informed that she was being reclassified as a "coordinator" and that her pay was being cut. She was also notified that the School of Medical Technology would be closing in July 2000. Plaintiff was advised that an entry-level medical technologist position would be available in the Ambulatory Care Center (ACC) that was being constructed, but that the position would not be available until the fall, when the new facility opened. Plaintiff submitted a written acceptance of the ACC position in March 2000.

Thereafter, defendant posted a position for Director of Planning and Marketing. Plaintiff applied for the position and requested an interview. In May 2000, the director position was offered to, and accepted by, a younger male. Plaintiff then sent a certified letter advising that she was officially declining the ACC position and that, if she were not considered for the Director of Planning and Marketing position, or a similar position, she would retire in October 2000. The School of Medical Technology closed as planned and plaintiff's position was not filled by anyone else. Plaintiff stopped working in July 2000 and retired with a pension in October 2000.

Plaintiff sued defendant alleging age and gender discrimination and wrongful discharge/breach of contract. Defendant moved for summary disposition under MCR 2.116(C)(10). The trial court granted summary disposition in favor of defendant on the age and gender discrimination claims as well as the wrongful discharge claim, but found that factual questions existed regarding whether defendant's human resources policy regarding job elimination and severance pay was applicable to the circumstances surrounding plaintiff's departure. Defendant then moved to determine nominal damages, and the trial court granted the motion. The trial court later corrected its initial finding that plaintiff had been terminated, and explained that because plaintiff had, in fact, retired from employment, she was not entitled to severance pay. Because no remaining issues existed, the trial court dismissed plaintiff's claim as a waste of judicial resources.

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant on her claims of age and gender discrimination. We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). The motion should be granted if the evidence demonstrates that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.*

The Michigan Civil Rights Act, MCL 37.2101 *et seq.*, prohibits employment discrimination based on age or gender. To establish a prima facie case of age discrimination, plaintiff must present evidence that, when viewed in a light most favorable to her, would permit a reasonable jury to find that she was discharged because of age. *Meagher v Wayne State Univ*, 222 Mich App 700, 709-710; 565 NW2d 401 (1997). To establish a prima facie case of gender discrimination, plaintiff must prove either disparate treatment or disparate impact. *Duranceau v Alpena Power Co*, 250 Mich App 179, 181-182; 646 NW2d 872 (2002). To avoid summary disposition under a disparate impact theory as plaintiff asserts here, she was required to show that female employees were burdened on account of their gender by some facially neutral practice. *Id.* at 183. Plaintiff must also establish membership in a protected class, and that she was treated differently “than persons of a different class for the same or similar conduct.” *Alsbaugh v Comm on Law Enforcement Standards*, 246 Mich App 547, 564; 634 NW2d 161 (2001), quoting *Wolff v Automobile Club of Michigan*, 194 Mich App 6, 11; 486 NW2d 75 (1992).

Once plaintiff presents a prima facie case of discrimination, the burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 134; 666 NW2d 186 (2003). If defendant produces such evidence, the presumption is rebutted, and the burden shifts back to plaintiff to show that defendant's reasons were not the true reasons, but a mere pretext for discrimination. *Id.*

The submitted evidence established that plaintiff's position with the School of Medical Technology was eliminated when defendant closed the school for financial reasons as part of a hospital reorganization. Defendant's laboratory director explained that the school cost the hospital approximately \$92,000 a year, that the hospital was struggling financially, that the hospital could recruit medical technologists without operating the school, and that the hospital had to balance the cost of the school with the fact that it hired at most one medical technologist a

year. Plaintiff admitted in her deposition that many other hospitals had closed their technical schools for financial reasons, and that she could not interest any other hospitals in the program. She also admitted that the only thing she had heard was that her teaching position was being eliminated for financial reasons. Plaintiff's mere subjective belief, unsupported by objective evidence, that defendant was eliminating her position to prevent her from receiving a full pension, which required that she continue working until she was 65 years old, is insufficient to establish a question of fact regarding her age discrimination claim. Indeed, plaintiff was offered another position that would have allowed her to continue to work and gain her full pension. Plaintiff failed to present a prima facie case of age discrimination with regard to the elimination of her teaching position and failed to rebut defendant's nondiscriminatory reason for why the position was eliminated.

Plaintiff also failed to establish that either age or gender were factors in defendant's decision to hire a younger male for the open director's position. The hospital went through a major reorganization, including termination of 17 directors and the closing of the medical technology school. Unlike many other employees, plaintiff was not terminated, but instead was offered and accepted a medical technologist position before the director's position was posted. Plaintiff was trained as a medical technologist, and she acknowledged that her former position as director of the technology school was unique in the hospital. Unlike the candidate selected to fill the Director of Planning and Marketing position, plaintiff did not have any marketing experience. There was no evidence that plaintiff was more—or even equally—qualified for the director's job, or that age or gender were factors in the decision to hire the candidate ultimately selected to fill the new position.

Similarly, there is no support for plaintiff's claim that she was discriminated against on the basis of her gender because she was paid less than male hospital directors. The evidence indicated that plaintiff's job title as "program director" of the medical technology school was unique to the hospital and largely academic, to satisfy accreditation requirements. The position was not commensurate with the job requirements and responsibilities of other department directors, both male and female. Thus, there is no basis for concluding that plaintiff was paid less than a similarly situated male employee.

Plaintiff also argues that the trial court erred in dismissing her claim that defendant breached its written "position-elimination" policy. The policy provides, in pertinent part:

(C) Rights of the individual whose position is being eliminated, downgraded or restructured include the opportunity to:

(1) Apply for any internally posted position for which they may qualify.

(2) Be interviewed for any vacant management or supervisory position for which they feel qualified. Managers retain the prerogative to select from all qualified applications.

The trial court determined that defendant breached the policy by not interviewing plaintiff for the new director's position, but concluded that dismissal of this claim was appropriate because even if plaintiff had interviewed for and been offered the director's position, she would not have had any "actionable expectation" that the job would be permanent, so any damages were speculative.

“The general rule is that remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action.” *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). “A plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable.” *Id.* The “blanket rule” that formally limited “recovery to nominal damages as a matter of law in all actions arising out of or related to the termination of at-will contracts” was abolished in *Health Call, supra* at 107. Thus, the mere fact that plaintiff was an at-will employee, by itself, was not enough to support a finding that she would only be entitled to nominal damages. *Id.* However, the burden was on plaintiff to show that any damages would not be speculative. *Id.* at 96. Here, even assuming that plaintiff had a right under defendant’s policy to be interviewed for the director’s position, plaintiff does not assert, and there is no reasonable basis in the record to find, that she would have been selected for the position over the candidate ultimately selected, who possessed specific planning and marketing experience that plaintiff admittedly lacked. Under these circumstances, plaintiff cannot establish with any reasonable certainty that she suffered damages attributable to defendant’s failure to interview her for the position.¹

Next, plaintiff argues that the trial court improperly granted summary disposition in favor of defendant on her claim based on an express just-cause contract of employment. Plaintiff testified that she was verbally told in 1964, and again in 1967, that she could only be terminated for just cause. Plaintiff acknowledged that she received an employee handbook in February 1992, and signed a statement acknowledging that she understood that any employment contract had to be in writing, dated, and signed by the hospital president. The acknowledgement further provided that “any written or oral statements regarding the creation of an employee contract by any person other than the president . . . are of no validity, force and effect, and should not be in any way relied upon.” Plaintiff did not believe that the handbook or the acknowledgement statement applied to her.

“Employment contracts for an indefinite duration are presumptively terminable at the will of either party for any reason or for no reason at all.” *Rood v Gen Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993). “[A]ny orally grounded contractual obligation for permanent employment ‘must be based on more than an expression of an optimistic hope of a long relationship.’” *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 640; 473 NW2d 268 (1991) (citation omitted). An express agreement regarding job security must be “clear and unequivocal.” *Lytle v Malady (On Rehearing)*, 458 Mich 153, 164; 579 NW2d 906 (1998). The words must “clearly indicate an intent to form a contract for permanent employment.” *Rowe, supra* at 645.

Here, plaintiff did not provide evidence of a clear and unequivocal promise of just-cause employment. Indeed, plaintiff acknowledged that she understood that hospitals must sometimes discharge people for financial reasons. Because plaintiff did not overcome the presumption of

¹ An employee is entitled to severance pay under defendant’s policy only if the employee is terminated. Because plaintiff was not terminated, she was not entitled to severance pay.

employment at will, the trial court properly dismissed plaintiff's claim based on the existence of an express just-cause employment contract.

Plaintiff also argues that the trial court abused its discretion by refusing to consider evidence obtained after the close of discovery when considering defendant's motion for summary disposition. We review for an abuse of discretion a trial court's decision regarding a discovery motion. *Hamed v Wayne Co*, 271 Mich App 106, 109; 719 NW2d 612 (2006).

Discovery was extended twice in this case and closed in May 2003. In November 2003, after discovery had ended, plaintiff filed "a notice of de bene esse deposition" for defendant's vice-president of planning, marketing, and development. Although he lived in the area and intended to be available for trial, plaintiff indicated that she wanted to take his deposition in order to preserve his testimony, in the event he became unavailable. Plaintiff did not express an intent to use the deposition to respond to defendant's motion for summary disposition. Although discovery had closed, the trial court allowed plaintiff to take the deposition to preserve testimony, but precluded plaintiff from using the deposition in her response to defendant's motion for summary disposition. Despite the trial court's ruling, plaintiff submitted an affidavit of her attorney outlining the deposition testimony as part of her response to defendant's motion. The trial court struck the affidavit.

On appeal, plaintiff has not shown that the trial court erred in striking counsel's affidavit. The trial court had the authority to set the date for completion of discovery. MCR 2.301. Plaintiff never attempted to take the deposition during the discovery period, which was extended on two occasions. Further, after discovery ended, plaintiff indicated that she wanted to take the deposition only for the purpose of preserving testimony in the event the witness became unavailable for trial, and she was afforded that opportunity. Under the circumstances, the trial court did not abuse its discretion by precluding plaintiff from using the untimely discovery as part of her response to defendant's motion.

In light of our decision, it is unnecessary to address defendant's issue on cross appeal.

We affirm.

/s/ Karen M. Fort Hood

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio